In the Supreme Court of the United States.

EDWARD H. CLARKE, Petitioner, AGAINST. WILBUR LARREMORE, trustee in bankruptcy of RAYMOND W. KENNEY, bankrupt, Respondent.	October Term 1902, No 51.

Supplemental Brief for Wilbur Larremore, Trustee, Respondent.

This brief is filed in pursuance of the order of the Court made on the 17th day of November, 1902, restoring the case to the docket with leave to counsel to submit it to a full bench on or before December 15th, 1902, on the briefs then on file and on such additional briefs as counsel may desire to file.

Since the argument in this case, the Court, in the case of *Metcalf* v. *Barker* (decision rendered December 1, 1902), has construed §67f of the bankrupt law. In the opinion given in that case, the Court say, after reciting the provisions of the section in question:

"In our opinion the conclusion to be drawn "from this language is that it is the lien created by a "levy, or a judgment, or an attachment, or otherwise, "that is invalidated, and that where the lien is obtained "more than four months prior to the filing of the pe- "tition, it is not only not to be deemed null and void on

"adjudication, but its validity is recognized. When it "is obtained within four months the property is dis- "charged therefrom, but not otherwise. A judgment "or decree in enforcement of an otherwise valid pre- "existing lien is not *the judgment denounced by the "statute, which is plainly confined to judgments creat- "ing liens.* If this were not so the date of the ac- "quisition of a lien by attachment or creditors' bill "would be entirely immaterial. Moreover other pro- "visions of the act render it unreasonable to impute "the intention to annul *all* judgments recovered within "four months."

This language is, of course, applicable to the circumstances of the case before the Court, and does not extend to the circumstances of this case. But it is in sympathy with our contention that it is the judgment and not the lien of the judgment (as the petitioner's counsel urges) which is avoided by the statute. Such is the plain wording of the statute. It is intended to meet a situation of the kind which is the basis of this proceeding. Nor is the quoted language of the Court to be construed too strictly. Technically speaking, judgments do not create liens, except on real estate—the lien arises on the issuance of an execution. It is the judgment establishing the right from which the lien follows of course, which is avoided. In this sense the judgment creates the lien, and it is the sense, we submit, which the act intends. Of the three particular words chosen by Congress, "levies, judgments, attachments," only the latter creates a lien. There is no lien created by a levy. And yet there is no doubt, we submit, as to what was intended by Congress. It intended that any preference obtained through legal proceedings within four months of the filing of a petition in bankruptcy should be rendered void, if an adjudication followed. As a creditor could obtain no title to or right in the bankrupt's property superior to the right of the trustee except through the prior intervention of a lien, such liens and the proceedings which created them were declared void. The trustee's priority was thus made certain. Congress took

pains to make this quite plain by providing further that the Court might order that *"the right under such* levy, *judgment,* attachment or other lien"—not the *lien itself* —should be preserved for the benefit of the estate. This clause would be substantially unnecessary except in a case such as this. If the bankrupt's property be not sold, if the title be still in him, subject to the lien, the trustee takes it free of the lien and his title is quite as good and usable for any purpose, if not better, than that of the lienor, to whose place he might be substituted. But where, as here, the property has been sold and the rights of *bona fide* purchasers have intervened, the preservation of the rights of the judgment creditor, under the judgment, to the proceeds of the sale for the benefit of the estate, becomes highly important.

In every proper sense, the judgment in this case was one creating a lien, and, if not, the execution issued upon it did so. The lien of an execution is avoided as well as the lien of a judgment. To maintain his claim to the money in question, the petitioner must show a title. One of the links in the chain of title is the lien either of a judgment or execution. If that be avoided, his title fails.

The result, if the contention of the petitioner's counsel should be sustained, would be most anomalous. For example, let us say that a creditor attaches a debtor's property within the four months' period in an action to which the debtor has interposed an answer. A second creditor, such as Clarke, subsequently commences an action, procures a judgment, issues execution and the property is sold by the Sheriff. The proceeds of sale in the hands of the Sheriff are nevertheless subject to the lien of the attachment. A petition in bankruptcy is then filed, followed by an adjudication. If the petitioner's counsel be correct, as between themselves and the trustee, the attaching creditor has no rights, because his lien was in existence at the time of the filing of the petition and was avoided by the bankruptcy act, while the judgment creditor's rights are preserved and he acquires the property, because the proceeds of sale are not subject to any lien and there is no lien to be avoided by the bankruptcy act. The creditor who is inferior in diligence,

and not unlikely to be in collusion with the debtor, would thus acquire an unjust preference over his superior in diligence, and over the trustee as well. It is surely a strained construction of the statute which would permit this.

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